

ADMINISTRATIVE APPEAL DECISION

MARCIA LEAVER, FILE NO. 91-010-007-1

DETROIT DISTRICT

APRIL 28, 2000

Review Officer: Suzanne Chubb, U.S. Army Corps of Engineers, Great Lakes & Ohio River Division, Cincinnati, Ohio.

Applicant: Ms. Marcia Leaver

Applicant Representative: None

Receipt of Request For Appeal (RFA): November 19, 1999

Basis for Appeal as Presented by Appellant:

Count: Based upon the appellant's interpretation of language at 40 CFR 230.6(a), she asserts that the project consists of minor, routine activities and should be authorized without extensive testing, evaluation or analysis. She identified several areas within the District's permit decision document where the District stated that potential project impacts would be minor.

Appeal Conference Date: March 2, 2000

Appeal Decision and Instructions to Detroit District Engineer (DE):

FINDING: Appeal does not have merit.

ACTION: No action required.

DISCUSSION: The basis of the appellant's RFA is her interpretation of the following quote from the U.S. Environmental Protection Agency (USEPA) 404(b)(1) Guidelines (hereafter referred to as Guidelines):

"It is anticipated that substantial numbers of permit applications will be for minor, routine activities that have little, if any, potential for significant degradation of the aquatic environment. It generally is not intended or expected that extensive testing, evaluation, or analysis will be needed to make findings of compliance in such routine cases." [40 CFR 230.6(a)].

The appellant believes her project is of a minor nature and should be authorized. In support of her position, she identified several areas within the District's permit decision document where the District determined that potential project impacts would be minor.

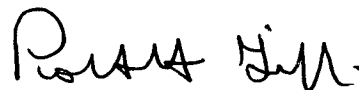
The above quote is meant to convey that the Guidelines contain sufficient flexibility for the Corps to tailor the rigor of its alternatives analysis based on the ecological value of the resource being impacted. The key distinction is that the flexibility is based upon an evaluation of project impacts on the aquatic environment, including direct, indirect and cumulative impacts, and is not strictly based on the project type.

The District determined that the project is a non-water dependent activity and does not comply with the Guidelines. This project affects a special aquatic site (SAS). The original purpose of the water dependency test was to recognize the special values of special aquatic sites, including wetlands, and to avoid their unnecessary destruction, particularly when less damaging practicable alternatives exist. Special aquatic sites are defined as "... geographical areas, large or small, possessing special ecological characteristics of productivity, habitat, wildlife protection, or other important and easily disrupted ecological values. These areas are generally recognized as significantly influencing or positively contributing to the general overall environmental health or vitality of the entire ecosystem of a region." [40 CFR 230.3 (q-1)] The Guidelines presumption, that alternatives not involving SAS are presumed to have less adverse aquatic impact, reinforces the special recognition of and protection of SAS.

The Detroit District found that the project, individually, would have minor long-term detriments to water quality, erosion, aquatic and terrestrial biota, wetlands, conservation and overall ecology, aesthetics, land use, and public recreational use. However, the District also determined that the cumulative impacts of similar discharges would result in major, long-term adverse impacts on many of these same public interest factors and that the project does not comply with the Guidelines.

The District suggested an open-pile boardwalk and use of a nearby public boat launching facility as alternatives to filling in the wetland. These alternatives would be less damaging to the aquatic ecosystem and would accomplish the appellant's objective of boat access to Lake St. Clair. Dredging of the canal, in conjunction with the appellant's neighbors and with upland disposal, may also be an acceptable alternative. Although not discussed in the EA, there are also less damaging, practicable alternatives to control unwanted vegetation without the discharge of fill material. The District can discuss these options with the appellant further.

In summary, the RFA was based on a misinterpretation of the USEPA 404(b)(1) Guidelines. The District determined that the cumulative impacts of this project would result in major, long-term adverse impacts on the aquatic environment. Less damaging, practicable alternatives were suggested and appear to be available to the appellant. The appeal is found to have no merit.



ROBERT H. GRIFFIN
Brigadier General, U.S. Army
Commanding